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Donaldson Bros. Ready Mix, Inc., and International Union of Operating Engineers, Local 400, AFL-CIO. Cases 19-CA-26948-1 through -7, 19-CA-27018, and 19-CA-27024

September 30, 2005

ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On May 19, 2004, the Board issued a decision in *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB No. 124 (2004), ordering the Respondent, to, inter alia, make whole employee David Raines for any loss of earnings and other benefits suffered as a result of the Respondent's discriminatory refusal to allow Raines to clock in early for work. A controversy having arisen over the amount of backpay due to Raines, on March 30, 2005,¹ the Regional Director for Region 19 issued a compliance specification and notice of hearing identifying the amount of backpay due to Raines under the Board's Order.² On April 11, the Respondent filed an answer to the compliance specification.

Thereafter, the Region notified the Respondent that it was going to amend the compliance specification and that the Respondent's answer did not comport with Section 102.56 of the Board's Rules and Regulations. On April 21, the Regional Director issued an amended compliance specification and notice of hearing. The amended compliance specification alleges that Raines is due backpay in the amount of 1.25 hours per day during the backpay period, computed on a quarterly basis. The 1.25 hours per day represents an average of the time that Raines typically had clocked in early prior to the Respondent's discriminatory prohibition against that practice. The amended specification further alleges that all backpay hours from 2000-2002 are calculated as overtime.

The Respondent subsequently filed an answer to the amended specification, in which it disputed the General Counsel's backpay formula, indicating that, at most, Raines may have started working 15 to 20 minutes prior to his shift. In addition, the Respondent denies that backpay for Raines should be measured as overtime. The

Respondent contends, among other things, that the General Counsel improperly relied on 1999 as the base year to compute backpay. On May 23, the Region again advised the Respondent that its answer failed to meet the requirements of Section 102.56 of the Board's Rules and Regulations. The General Counsel also informed Respondent that a motion for summary judgment would be filed if the Respondent did not file an appropriate amended answer. The Respondent then filed a modified answer in response to the General Counsel's concerns, which states that Raines is "entitled to backpay consistent with the Board's Order."

On July 15, the General Counsel filed with the Board a Motion for Partial Summary Judgment. Thereafter, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent then timely filed an opposition to General Counsel's Motion for Partial Summary Judgment (opposition brief).

In his Motion for Partial Summary Judgment, the General Counsel explains that the backpay formula in the amended compliance specification stems from the Board's findings in *Donaldson Bros.*, supra. In particular, the General Counsel refers to the Board's findings that Raines' practice was to clock in between 1.30 and 1-1/4 minutes early, and that Raines had engaged in this practice for approximately 9 years prior to the Respondent's discriminatory conduct. The General Counsel further contends that the Respondent's modified answer does not comport with Section 102.56 of the Board's Rules and Regulations because the Respondent does not provide any basis for disputing the General Counsel's theory and calculations for Raines' backpay.

Section 102.56 of the Board's Rules and Regulations sets forth the requirements for an answer to a compliance specification. Section 102.56(b) provides, in pertinent part:

As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

In determining whether the Respondent's denial of the allegations in the amended compliance specification is sufficient to avoid summary judgment, we shall consider the Respondent's answers and opposition brief. See *United*

¹ All dates are in 2005, unless otherwise noted.

² The parties agree the appropriate backpay period for Raines is April 6, 2000-March 31, 2003.

States Service Industries, 325 NLRB 485 fn. 2 (1998) (before a hearing, a respondent may cure defects in its amended answer by its response to the Notice to Show Cause). We find that the Respondent's answers, together with its opposition brief, set forth with sufficient specificity the Respondent's disagreement with the amended specification's gross backpay formula and supply an alternative formula for calculating gross backpay. In this regard, the Respondent, in its opposition brief, explains the contention in its modified answer that "Raines is entitled to backpay consistent with the Board's Order." The Respondent specifically refutes the General Counsel's contention that the Board held that Raines' practice throughout his tenure with the Respondent was to clock in between one and one half and one hour and fifteen minutes early. The Respondent asserts that the Board instead found that Raines "consistently clocked in about an hour earlier than his scheduled starting time." The Respondent explains that there is a substantial difference between clocking in one hour early and clocking in up to an hour and one half early, as the General Counsel alleges.³

We find that the Respondent's answers and opposition brief satisfy the requirements of Section 102.56 because they sufficiently state the basis for the Respondent's disagreement with the General Counsel's figures, set forth alternative premises, and furnish appropriate supporting figures.⁴ Accordingly, we shall deny the General Counsel's Motion for Partial Summary Judgment.

ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is denied and the proceeding is remanded to the Regional Director for Region 19 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge.

Dated, Washington, D.C. September 30, 2005

Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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Peter C. Schaumber,	Member
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³ The Respondent also appears to be disputing the General Counsel's allegation that Raines' backpay for 2000–2002 should be calculated as overtime rather than straight time. Thus, attached to its answer to the amended compliance specification, the Respondent submitted a summary of hours worked by Raines during the backpay period showing that Raines did not always work more than 40 hours per week during that period.

⁴ We find it unnecessary to consider the Respondent's contention that the General Counsel improperly relied on 1999 as the base year to compute backpay because the General Counsel used 1999 as a base year only in its initial compliance specification, which was superseded by its amended compliance specification.